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**** E-filed September 20, 2010 ****

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ARTIFEX SOFTWARE INC., a
California corporation,

Plaintiff,

v.

PALM INC., a Delaware corporation,

Defendant.

Case No. 5:09-cv-05679-JF

**~~PROPOSED~~ STIPULATED
PROTECTIVE ORDER
AS AMENDED BY THE COURT**

15 || 2. DEFINITIONS

2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

23 2.4 Designating Party: a Party or Non-Party that designates information
24 or items that it produces in disclosures or in responses to discovery as
25 “CONFIDENTIAL.”

STIPULATED PROTECTIVE ORDER
CASE NO. 5:09-CV-05679 JF

1 generated in disclosures or responses to discovery in this matter.

2 2.6 Expert: a person with specialized knowledge or experience in a
3 matter pertinent to the litigation who has been retained by a Party or its counsel to serve as
4 an expert witness or as a consultant in this action.

5 2.7 “Highly Confidential – Attorneys’ Eyes Only” Information or Items:
6 extremely sensitive “Confidential” Information or Items whose disclosure to another Party
7 or nonparty would create a substantial risk of serious injury that could not be avoided by
8 less restrictive means.

9 2.8 House Counsel: attorneys who are employees of a party to this
10 action. House Counsel does not include Outside Counsel of Record or any other outside
11 counsel.

12 2.9 Non-Party: any natural person, partnership, corporation, association,
13 or other legal entity not named as a Party to this action.

14 2.10 Outside Counsel of Record: attorneys who are not employees of a
15 party to this action but are retained to represent or advise a party to this action and have
16 appeared in this action on behalf of that party or are affiliated with a law firm which has
17 appeared on behalf of that party.

18 2.11 Party: any party to this action, including all of its officers, directors,
19 employees, consultants, retained experts, and Outside Counsel of Record (and their
20 support staffs).

21 2.12 Producing Party: a Party or Non-Party that produces Disclosure or
22 Discovery Material in this action.

23 2.13 Professional Vendors: persons or entities that provide litigation
24 support services (e.g., photocopying, videotaping, translating, preparing exhibits or
25 demonstrations, and organizing, storing, or retrieving data in any form or medium) and
26 their employees and subcontractors.

27 2.14 Protected Material: any Disclosure or Discovery Material that is
28 designated as “CONFIDENTIAL.”

1 2.15 Receiving Party: a Party that receives Disclosure or Discovery
2 Material from a Producing Party

3 3. SCOPE

4 The protections conferred by this Stipulation and Order cover not only Protected
5 Material (as defined above), but also (1) any information copied or extracted from
6 Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected
7 Material; and (3) any testimony, conversations, or presentations by Parties or their
8 Counsel that might reveal Protected Material. However, the protections conferred by this
9 Stipulation and Order do not cover the following information: (a) any information that is
10 in the public domain at the time of disclosure to a Receiving Party or becomes part of the
11 public domain after its disclosure to a Receiving Party as a result of publication not
12 involving a violation of this Order, including becoming part of the public record through
13 trial or otherwise; and (b) any information known to the Receiving Party prior to the
14 disclosure or obtained by the Receiving Party after the disclosure from a source who
15 obtained the information lawfully and under no obligation of confidentiality to the
16 Designating Party. Any use of Protected Material at trial shall be governed by a separate
17 agreement or order.

18 4. DURATION

19 Even after final disposition of this litigation, the confidentiality obligations
20 imposed by this Order shall remain in effect until a Designating Party agrees otherwise in
21 writing or a court order otherwise directs. Final disposition shall be deemed to be the later
22 of (1) dismissal of all claims and defenses in this action, with or without prejudice; and (2)
23 final judgment herein after the completion and exhaustion of all appeals, rehearings,
24 remands, trials, or reviews of this action, including the time limits for filing any motions
25 or applications for extension of time pursuant to applicable law. This Court will retain jurisdiction
to enforce the terms of this
protective order for a period of six (6) months after the final disposition of this action.

26 5. DESIGNATING PROTECTED MATERIAL

27 5.1 Exercise of Restraint and Care in Designating Material for
28 Protection. Each Party or Non-Party that designates information or items for protection

1 under this Order must take care to limit any such designation to specific material that
 2 qualifies under the appropriate standards. The Designating Party must designate for
 3 protection only those parts of material, documents, items, or oral or written
 4 communications that qualify — so that other portions of the material, documents, items,
 5 or communications for which protection is not warranted are not swept unjustifiably
 6 within the ambit of this Order.

7 Mass, indiscriminate, or routinized designations are prohibited. Designations that
 8 are shown to be clearly unjustified or that have been made for an improper purpose (e.g.,
 9 to unnecessarily encumber or retard the case development process or to impose
 10 unnecessary expenses and burdens on other parties) expose the Designating Party to
 11 sanctions.

12 If it comes to a Designating Party's attention that information or items that it
 13 designated for protection do not qualify for protection, that Designating Party must
 14 promptly notify all other Parties that it is withdrawing the mistaken designation.

15 **5.2** Manner and Timing of Designations. Except as otherwise provided
 16 in this Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise
 17 stipulated or ordered, Disclosure or Discovery Material that qualifies for protection under
 18 this Order must be clearly so designated before the material is disclosed or produced.

19 Designation in conformity with this Order requires:

20 (a) for information in documentary form (apart from transcripts of
 21 depositions or other pretrial or trial proceedings), that the Producing Party affix the legend
 22 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” at
 23 the top of each page that contains protected material. If only a portion or portions of the
 24 material on a page qualifies for protection, the Producing Party also must clearly identify
 25 the protected portion(s) (e.g., by making appropriate markings in the margins) and must
 26 specify, for each portion, the level of protection being asserted (either
 27 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

28 A Party or Non-party that makes original documents or materials available for

inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order. Then, before producing the specified documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) at the top of each page that contains Protected Material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (*e.g.*, by making appropriate markings in the margins) and must specify, for each portion, the level of protection being asserted (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

(b) for testimony given in deposition or in other pretrial or trial proceedings, that the Designating Party identify on the record, before the close of the deposition, hearing, or other proceeding, all protected testimony.

Transcript pages containing Protected Material must be separately bound by the court reporter, who must affix to the top of each such page the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” as instructed by the Designating Party offering or sponsoring the witness or presenting the testimony.

(c) for information produced in some form other than documentary, and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” If only portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected

portions, specifying whether they qualify as “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.”

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” does not, standing alone, waive the Designating Party’s right to secure protection under this Order for such material. If material is appropriately designated as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” after the material was initially produced, the Receiving Party, on timely notification of the designation, must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a Designating Party’s confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly (in voice to voice dialogue; other forms of communication are not sufficient) within 14 days of the date of service of notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the

1 chosen designation. A Challenging Party may proceed to the next stage of the challenge
2 process only if it has engaged in this meet and confer process first or establishes that the
3 Designating Party is unwilling to participate in the meet and confer process in a timely
4 manner.

5 6.3 Judicial Intervention. If the Parties cannot resolve a challenge
6 without court intervention, the Designating Party shall file and serve a motion to retain
7 confidentiality under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if
8 applicable) within 21 days of the initial notice of challenge or within 14 days of the parties
9 agreeing that the meet and confer process will not resolve their dispute, whichever is
10 earlier. Each such motion must be accompanied by a competent declaration affirming that
11 the movant has complied with the meet and confer requirements imposed in the preceding
12 paragraph. Failure by the Designating Party to make such a motion including the required
13 declaration within 21 days (or 14 days, if applicable) shall automatically waive the
14 confidentiality designation for each challenged designation. In addition, the Challenging
15 Party may file a motion challenging a confidentiality designation at any time if there is
16 good cause for doing so, including a challenge to the designation of a deposition transcript
17 or any portions thereof. Any motion brought pursuant to this provision must be
18 accompanied by a competent declaration affirming that the movant has complied with the
19 meet and confer requirements imposed by the preceding paragraph.

20 The burden of persuasion in any such challenge proceeding shall be on the
21 Designating Party. Frivolous challenges, and those made for an improper purpose (e.g., to
22 harass or impose unnecessary expenses and burdens on other parties) may expose the
23 Challenging Party to sanctions. Unless the Designating Party has waived the
24 confidentiality designation by failing to file a motion to retain confidentiality as described
25 above, all parties shall continue to afford the material in question the level of protection to
26 which it is entitled under the Producing Party's designation until the court rules on the
27 challenge.
28

1 7. ACCESS TO AND USE OF PROTECTED MATERIAL

2 7.1 Basic Principles. A Receiving Party may use Protected Material that
3 is disclosed or produced by another Party or by a Non-Party in connection with this case
4 only for prosecuting, defending, or attempting to settle this litigation. Such Protected
5 Material may be disclosed only to the categories of persons and under the conditions
6 described in this Order. When the litigation has been terminated, a Receiving Party must
7 comply with the provisions of section 13 below (FINAL DISPOSITION).

8 Protected Material must be stored and maintained by a Receiving Party at a
9 location and in a secure manner that ensures that access is limited to the persons
10 authorized under this Order.

11 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless
12 otherwise ordered by the court or permitted in writing by the Designating Party, a
13 Receiving Party may disclose any information or item designated “CONFIDENTIAL”
14 only to

15 (a) the Receiving Party’s Outside Counsel of record in this action,
16 as well as employees of said Counsel to whom it is reasonably necessary to disclose the
17 information for this litigation and who have signed the “Acknowledge and Agreement To
18 Be Bound By Stipulated Protective Order” that is attached hereto as Exhibit A;

19 (b) the officers, directors, and employees (including House
20 Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this
21 litigation and who have signed the “Acknowledge and Agreement To Be Bound By
22 Stipulated Protective Order” (Exhibit A);

23 (c) Experts (as defined in this Order) of the Receiving Party to
24 whom disclosure is reasonably necessary for this litigation and who have signed the
25 “Acknowledge and Agreement To Be Bound By Stipulated Protective Order” (Exhibit A);

26 (d) the Court and its personnel;

27 (e) court reporters, their staffs, and Professional Vendors to whom
28 disclosure is reasonably necessary for this litigation and who have signed the

1 “Acknowledge and Agreement To Be Bound By Stipulated Protective Order” (Exhibit A);

2 (f) during their depositions, witnesses in the action to whom
3 disclosure is reasonably necessary and who have signed the “Acknowledge and
4 Agreement To Be Bound By Stipulated Protective Order” (Exhibit A). Pages of
5 transcribed deposition testimony or exhibits to depositions that reveal Protected Material
6 must be separately bound by the court reporter and may not be disclosed to anyone except
7 as permitted under this Stipulated Protective Order.

8 (g) the author of the document or the original source of the
9 information.

10 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
11 ONLY” Information or Items. Unless otherwise ordered by the Court or permitted in
12 writing by the Designating Party, a Receiving Party may disclose any information or item
13 designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

14 (a) the Receiving Party’s Outside Counsel of record in this action,
15 as well as employees of said Counsel to whom it is reasonably necessary to disclose the
16 information for this litigation and who have signed the “Acknowledge and Agreement To
17 Be Bound By Stipulated Protective Order” that is attached hereto as Exhibit A;

18 (b) House Counsel of a Receiving Party (1) who has no
19 involvement in competitive decision-making or in patent prosecutions involving any
20 affiliate marketing program, (2) to whom disclosure is reasonably necessary for this
21 litigation, and (3) who has signed the “Acknowledge and Agreement To Be Bound By
22 Stipulated Protective Order” (Exhibit A);

23 (c) Experts (as defined in this Order) (1) to whom disclosure is
24 reasonably necessary for this litigation, (2) who have signed the “Acknowledge and
25 Agreement To Be Bound By Stipulated Protective Order” (Exhibit A), and (3) as to whom
26 the procedures set forth in paragraph 8, below, have been followed;

27 (d) the Court and its personnel;

28 (e) court reporters, their staffs, and Professional Vendors to whom

1 disclosure is reasonably necessary for this litigation and who have signed the
2 “Acknowledge and Agreement To Be Bound By Stipulated Protective Order” (Exhibit A);
3 and

4 (f) the author of the document or the original source of the
5 information.

6 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED
7 IN OTHER LITIGATION

8 If a Party is served with a subpoena or a court order issued in other litigation that
9 compels disclosure of any information or items designated in this action as
10 “CONFIDENTIAL,” that Party must:

11 (a) promptly notify in writing the Designating Party. Such notification
12 shall include a copy of the subpoena or court order;

13 (b) promptly notify in writing the party who caused the subpoena or
14 order to issue in the other litigation that some or all of the material covered by the
15 subpoena or order is subject to this Protective Order. Such notification shall include a
16 copy of this Stipulated Protective Order; and

17 (c) cooperate with respect to all reasonable procedures sought to be
18 pursued by the Designating Party whose Protected Material may be affected. If the
19 Designating Party timely seeks a protective order, the Party served with the subpoena or
20 court order shall not produce any information designated in this action as
21 “CONFIDENTIAL” before a determination by the court from which the subpoena or
22 order issued, unless the Party has obtained the Designating Party’s permission. The
23 Designating Party shall bear the burden and expense of seeking protection in that court of
24 its confidential material — and nothing in these provisions should be construed as
25 authorizing or encouraging a Receiving Party in this action to disobey a lawful directive
26 from another court.

1 9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE
 2 PRODUCED IN THIS LITIGATION

3 (a) The terms of this Order are applicable to information produced by a
 4 Non- Party in this action and designated as “CONFIDENTIAL.” Such information
 5 produced by Non-Parties in connection with this litigation is protected by the remedies
 6 and relief provided by this Order. Nothing in these provisions should be construed as
 7 prohibiting a Non-Party from seeking additional protections.

8 (b) In the event that a Party is required, by a valid discovery request, to
 9 produce a Non-Party’s confidential information in its possession, and the Party is subject
 10 to an agreement with the Non-Party not to produce the Non-Party’s confidential
 11 information, then the Party shall:

12 1. promptly notify in writing the Requesting Party and the Non-
 13 Party that some or all of the information requested is subject to a confidentiality
 14 agreement with a Non-Party;

15 2. promptly provide the Non-Party with a copy of the Stipulated
 16 Protective Order in this litigation, the relevant discovery request(s), and a reasonably
 17 specific description of the information requested; and

18 (c) make the information requested available for inspection by the Non-
 19 Party.

20 If the Non-Party fails to object or seek a protective order from this court within 14
 21 days of receiving the notice and accompanying information, the Receiving Party may
 22 produce the Non-Party’s confidential information responsive to the discovery request. If
 23 the Non-Party timely seeks a protective order, the Receiving Party shall not produce any
 24 information in its possession or control that is subject to the confidentiality agreement
 25 with the Non-Party before a determination by the court.¹ Absent a court order to the

26
 27 ¹ The purpose of this provision is to alert the interested parties to the existence of confidentiality
 28 rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality
 interests in this court.

1 contrary, the Non-Party shall bear the burden and expense of seeking protection in this
2 court of its Protected Material

3
4 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

5 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
6 Protected Material to any person or in any circumstance not authorized under this
7 Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing
8 the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all
9 unauthorized copies of the Protected Material, (c) inform the person or persons to whom
10 unauthorized disclosures were made of all the terms of this Order, and (d) request such
11 person or persons to execute the "Acknowledgment and Agreement To Be Bound" that is
12 attached hereto as Exhibit A.

13 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
14 PROTECTED MATERIAL

15 When a Producing Party gives notice to Receiving Parties that certain inadvertently
16 produced material is subject to a claim of privilege or other protection, the obligations of
17 the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B).
18 This provision is not intended to modify whatever procedure may be established in an e-
19 discovery order that provides for production without prior privilege review. Pursuant to
20 Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the
21 effect of disclosure of a communication or information covered by the attorney-client
22 privilege or work product protection, the parties may incorporate their agreement in the
23 stipulated protective order submitted to the court

24 12. MISCELLANEOUS

25 12.1 Right to Further Relief. Nothing in this Order abridges the right of
26 any person to seek its modification by the Court in the future.

27 12.2 Right to Assert Other Objections. By stipulating to the entry of this
28 Stipulated Protective Order no Party waives any right it otherwise would have to object to

disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Stipulated Protective Order

12.3 Filing Protected Material. Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this action any Protected Material. A Party that seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court, then the Receiving Party may file the information in the public record pursuant to Civil Local Rule 795(e) unless otherwise instructed by the court.

and General
Order 62

13. FINAL DISPOSITION.

Within 60 days after the final disposition of this action, as defined in paragraph 4, each Receiving Party must return all Protected Material to the Producing Party or destroy such material. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries, and any other format reproducing or capturing any of the Protected Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or any other format reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,

1 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney
2 work product, and consultant and expert work product, even if such materials contain
3 Protected Material. Any such archival copies that contain or constitute Protected Material
4 remain subject to this Protective Order as set forth in Section 4 (DURATION).

5
6 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

7
8
9 DATED: September 14, 2010

/s/ Darin W. Snyder
O'Melveny & Myers LLP
Attorneys for Plaintiff

10
11 DATED: September 14, 2010

/s/ Joseph C. Gratz
Durie Tangri LLP
Attorneys for Defendant

12
13
14 **ATTESTATION**

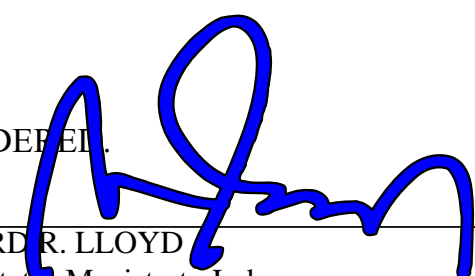
15 Pursuant to General Order No. 45 X(B), I hereby attest that concurrence in the
16 filing of this document has been obtained from Joseph C. Gratz.

17 By: /s/ Darin W. Snyder

18 Darin W. Snyder

19
20
21 PURSUANT TO STIPULATION, IT IS SO ORDERED.

22 DATED: September 20, 2010



HOWARD R. LLOYD
United States Magistrate Judge

EXHIBIT AACKNOWLEDGE AND AGREEMENT TO BE BOUND BY STIPULATED
PROTECTIVE ORDER

I, _____ [print or type full name], of
 _____ [print or type full address], declare
 under penalty of perjury that I have read in its entirety and understand the Stipulated
 Protective Order that was issued by the United States District Court for the Northern
 District of California on _____ [date] in the case of *Artifex Software Inc. v. Palm
 Inc.*, Case No. 5:09-cv-05679 JF. I agree to comply with and to be bound by all the terms
 of this Stipulated Protective Order and I understand and acknowledge that failure to so
 comply could expose me to sanctions and punishment in the nature of contempt. I
 solemnly promise that I will not disclose in any manner any information or item that is
 subject to this Stipulated Protective Order to any person or entity except in strict
 compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for
 the Northern District of California for the purpose of enforcing the terms of this Stipulated
 Protective Order, even if such enforcement proceedings occur after termination of this
 action.

I hereby appoint _____ [print or type full name] of
 _____ [print or type full address and
 telephone number] as my California agent for service of process in connection with this
 action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____
 [printed name]

Signature: _____
 [signature]